IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6985

William Perryman, Petitioner

-vs-

STATE OF OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

OHIO SUPREME COURT

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IN THE
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October Term, 1976

No. _____

William Perryman, Petitioner

-vs-

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO
OHIO SUPREME COURT

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

William Perryman, the Petitioner herein, prays that a writ of certiorari issue to review the Judgment and sentence of Death of the Ohio Supreme Court entered in the above-captioned case on December 29, 1976 in which the Motion for Rehearing was denied on January 28, 1977.

OPINIONS BELOW

The decision of the Ohio Supreme Court denying rehearing is reported at Vol. L Ohio Bar No. 7, p. 218, and is reproduced in the appendix hereto, infra, page 1. The decision of the Ohio Supreme Court is reported at 49 Ohio St. 2d 14 (1976) and is reproduced in the appendix hereto infra page 2 through 10. The decision and Journal Entry of the Ohio Court of Appeals, Ninth Judicial District is unreported and is reproduced in the appendix hereto infra pages 11 through 26.

JURISDICTION

The final order of the Ohio Supreme Court (appendix infra, page 1) was entered on January 28, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Does the imposition and carrying out of Petitioner's sentence of death violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?
2. Does the admission into evidence of a hearsay confession of an alleged accomplice implicating the Petitioner and hearsay testimony as to the conduct of the Petitioner when confronted with said statement violate the Sixth and Fourteenth Amendments when neither declarant is subject to cross-examination?
3. Does the admission of testimony during the prosecutor's case-in-chief that Petitioner exercised his *Miranda* rights during custodial interrogation offend the Fifth, Sixth, and Fourteenth Amendments?
4. Does the Fourteenth Amendment Due Process Clause require that stricter scrutiny be given to the reliability of identification testimony in a capital trial and is due process violated by the admission of the identification herein?

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

1. This case also involves the following Provisions of Ohio Law Pertaining to Capital Punishment:

Ohio Rev. Code Ann. Section 2903.01 (1974). Aggravated murder.

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Section 2929.02 (1974). Penalties for murder.

> (A) Whoever is convicted of aggravated mur[illegible] violation of section 2903.01 of the Revis[illegible]e shall suffer death or be imprisoned for [illegible] as determined pursuant to sections 2929.[illegible]nd 29[illegible].04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

Ohio Rev. Code Ann. Section 2929.03 (1974). Imposing sentence for a capital offense.

> (A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury.

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Section 2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state or the president-elect or vice president-elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist

was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

On Wednesday evening, November 27, 1974, Lawrence Busch was shot and killed during an attempted robbery of his business, the Star Supermarket, located in Akron, Ohio. Three months later on March 28, 1975, the Summit County Grand Jury indicted Petitioner, Wendell Pitts, and Delbert Richmond on the capital offense of aggravated murder, Ohio Revised Code 2903.01(B), with two specifications of aggravating circumstances, Ohio Revised Code 2929.04(A)(3)(7), along with one count of aggravated robbery. On June 30, 1975, Petitioner was convicted after a trial by jury of aggravated murder, aggravated robbery and one aggravating specification.* Following a mitigation hearing conducted before the trial judge at which Petitioner maintained his innocence, the Court sentenced Petitioner to Death. After a separate trial, co-defendant Pitts was convicted on all charges; however, after later determination that a mitigating circumstance existed, he was sentenced to life imprisonment. Co-defendant Richmond, in exchange for his testimony at Petitioner's trial, pled guilty to an amended indictment of involuntary manslaughter and aggravated robbery and received a sentence of six (6) to twenty-five (25) years. Petitioner's conviction and sentence of Death was affirmed by both the Ninth Judicial District Court of Appeals and the Ohio Supreme Court.

The operative facts that allegedly culminated in the Lawrence Busch homicide were presented in Petitioner's trial through the testimony of Delbert Richmond, who had confessed involvement in the crime. Richmond's cooperation with the police authorities found its genesis in his arrest for an unrelated armed robbery. T. 599. Prior to this arrest, he had been convicted for possessing stolen property and concealing stolen property. T. 598. Richmond, in an effort to collect the promised reward offered regards to the homicide at the Star Market, offered his testimony to the State. T. 864. However, after the State learned of his participation in the crime, it was agreed upon that in exchange for testifying against the

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*Petitioner was found guilty of killing the victim for the purpose of escaping detention for the aggravated robbery, (Ohio Revised Code 2929.04 (A)(3)), but not guilty of killing the victim while either committing, attempting to commit, or fleeing from the aggravated robbery of Lawrence Busch (Ohio Revised Code 2929.04(A)(7)).

Petitioner, Richmond would be allowed to plead guilty to the lesser included offense of manslaughter with a recommended sentence of seven to twenty-five years in prison, T. 591, 623, instead of standing trial for charges of aggravated murder with a possible punishment of death. Richmond testified that Petitioner was originally from New York and that he had known Petitioner for approximately a year, having become acquainted while staying in the same Akron neighborhood. Richmond contended that two weeks prior to Thanksgiving, 1974, the Petitioner and Richmond formulated a plan to rob the Star Market on Arlington Street. T. 603-604. According to Richmond's testimony, the plan called for the owner of the Market, Busch, to be forced, at gunpoint, into a stolen car and transported to a designated laundromat where he would be forced to call the store and direct the employees to give Richmond the money from the store. T. 605.

Richmond alleged that on the night of the robbery he had accompanied Petitioner to the Star Market and participated in the crime but that Petitioner was the actual triggerman.

In an attempt to corroborate Richmond's statement implicating Petitioner, the State called Michael Alldredge, who testified that on the night of November 27, 1974, he was at the Star Market. While he was leaving the store, he observed an argument between Lawrence Busch and a man in the parking lot. T. 733. Alldredge turned away and started for his own car when he heard several shots and was nearly hit by a car speeding from the parking lot. T. 736. Upon returning home, Alldredge called the police and gave a very general description of the man in the parking lot who was arguing with Lawrence Busch.

On March 25, 1975, after Petitioner's arrest and four months after the crime, the Akron Police Detectives asked Alldredge to view six Akron "mug shot" photos, the defendant's photo being among them. The bottom portion of each photo had an identifying number, date of arrest, height, and weight of each individual. Three of the photos had arrest dates prior to this crime and the Petitioner was the tallest and heaviest member of the array. After viewing the photos for about five minutes, Alldredge picked out the Petitioner's photo stating that he could only be "80 to 85 percent positive" that this was the individual, T. 738, 432, and that "all colored people looked alike to him." T. 748-749. After Alldredge picked out a picture

(Petitioner), he was told by the police that that man in the photograph had already been arrested and charged in regards to the Star Market robbery. T. 439, 441, 749.

Although lineup facilities were available for use, Petitioner was identified, as are 99.9 percent of all identifications made by the Akron Police Department. T. 874.

At the trial, Alldredge had difficulty in recalling the description he had given the police. He testified that it was dark out, T. 746, that he only observed a side profile of the individual, and that he was surprised, nervous, and frightened at the time of his observation. T. 859, 860. Alldredge then stated that he was about 85 percent certain that the Petitioner was the man he observed arguing with Busch in the parking lot. T. 738.

The State also offered testimony of Detective Edward Duvall, Jr., who was present during the custodial interrogation of Petitioner by another Akron Police Detective, Captain John Traub. Over defense counsel's continuing objection, Duvall testified that Detective Traub told Petitioner that his accomplices (Pitts and Richmond) had been arrested and that both of them had identified Petitioner as the "triggerman." After this accusatory statement, Duvall testified that in his opinion Petitioner appeared nervous and hesitant after which he requested to speak with an attorney. T. 792. Based upon Duvall's testimony, a timely motion for a mistrial was made and denied. T. 325. Neither the interrogationing officer, Captain Traub, nor Petitioner alleged accomplice Pitts ever testified at trial.

In his own defense Petitioner did not take the stand, but offered testimony to show that he was not at the Star Supermarket the night of November 27, 1974. There was further testimony that Richmond had bragged to others about having killed someone during the robbery.

The case was presented to the jury, and on June 30, 1975, at 5:37 p.m., while deliberating, the jury requested from the Court an answer to the following question: "Would guilt on specification number one indicate that the Defendant was the triggerman?" An answer of "not necessarily" was given and several hours later a verdict of guilty was returned on aggravated murder, aggravated robbery, and one of the two specifications of aggravating circumstances, namely that the homicide was to escape detention for the robbery.

Pursuant to Ohio Revised Code, §2929.03-04, the jury was dismissed and Petitioner's case was continued pending a pre-sentence investigation and psychological and psychiatric examinations of the Petitioner for purposes of the mitigation hearing to be held before the trial judge.

At this mitigation hearing, the Petitioner maintained his innocence; however, no mitigating factors were found, and the trial judge sentenced the Petitioner to death.

Petitioner timely filed his appeal in the Ninth Judicial District Court of Appeals for Summit County, Ohio. The Petitioner raised nine assignments of error. The pertinent ones in relation to the questions presented in the petition were:

I

> "The Defendant was prejudiced by the admission of double hearsay statements, inculpating him, which violated his Sixth and Fourteenth Amendment rights."

II

> "The Defendant's Constitutional rights, as set forth in Griffin v. California and United States v. Nolan, were violated. The State may not use at trial the fact that the Defendant claimed his Constitutional privileges in the face of an accusation."

III

> "Photographic identification procedures are not to be employed when suspect is in custody and a lineup is otherwise feasible unless police can offer extenuating circumstances justifying use of a photographic identification."

IV

> "The death penalty is cruel and unusual punishment in violation of the Eighth Amendment."

The Ninth District Court of Appeals found no error and, on March 26, 1976, affirmed the Petitioner's conviction and sentence of death.

Pursuant to Ohio Constitution, Article IV, §2 Cl. (B)(2), The Petitioner appealed his case to the Supreme Court of Ohio presenting twelve propositions of law, the following being the relevant ones for this petition.

I

> Testimony relating the conduct of an accused in remaining silent when faced with custodial accusation may not be received in evidence against him, for to do so would constitute a violation of the accused's Fifth Amendment rights.

Further, as a matter of State evidence law, Chapman not applying, there is a "reasonable possibility" the inadmissible evidence might have contributed to the conviction.

II

The Defendant's constitutional rights, as set forth in Griffin v. California and United States v. Nolan, were violated. The prosecution may not use at trial the fact that the Defendant stood mute or claimed his privilege, under Miranda, in the face of accusation. The State may not use at trial the fact that the Defendant claimed his constitutional privileges in the face of accusation.

III

Photographic identification procedures are not to be employed when suspect is in custody and a lineup is otherwise feasible unless the police can offer extenuating circumstances justifying use of a photographic identification.

IV

The Ohio death penalty statutes, specifically sections 2929.03 R.C. and 2929.04 R.C. are arbitrary, capricious, unreasonable, and violate due process and the Eighth Amendment.

The Ohio Supreme Court, in response to Proposition of Law I, found that the trial court erroneously admitted the testimony in question; however, they found such errors harmless. Finding no other errors in the Petitioner's case, the Supreme Court of Ohio affirmed his conviction and sentence of death on December 29, 1976, in their Opinion at 49 Ohio St. 2d 14 (1976).

Petitioner, on or about January 10, 1977, filed with the Supreme Court of Ohio a motion for rehearing setting forth six grounds therein. The Ohio Supreme Court denied the Petitioner's request on January 28, 1977.

The Petitioner timely filed an application for extension to file his petition before this Honorable Court. The extension was granted by the Honorable Justice Stewart allowing Petitioner until June 27, 1977, to file his petition. Petitioner's sentence of death has been stayed by the Ohio Supreme Court pending this Petition for Certiorari. The within action is before this Honorable Court on a petition for Writ of Certiorari to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

Summary of the Ohio Capital Punishment Statutes

The most serious crime in Ohio is aggravated murder, proscribed by Section 2903.01 of the Ohio Revised Code. Aggravated murder occurs if there is a purposeful killing that takes place with "prior calculation and design," or if there is a purposeful killing of another in the course of committing, or attempting to commit, any one of ten enumerated felonies. See generally Ohio Revised Code, § 2929.04(A) and (B). The first category involves what is essentially the common law offense of premeditated murder, while the latter category involves what was essentially the felony-murder doctrine with the additional requirement that the death be purposefully caused.

Conviction for aggravated murder alone does not necessarily resolve in the imposition of the death penalty. Eg. Ohio Revised Code § 2929.03(A). Indeed, in order for the death penalty to be a possible sentence at all, the accused must be indicted not only for aggravated murder but also for one of seven enumerated specifications. Ohio Revised Code, § 2929.03(B). It should be noted that the killing of another with prior calculation and design is not one of the specifications. On the other hand, purposeful death resulting from the commission of certain of the felonies which would cause the offense to be aggravated murder will also serve as one of the specifications under which the death penalty can be imposed. Ohio Revised Code § 2929.04(A)(7).

In order to receive the death penalty, an accused must first be indicted both for aggravated murder and for one or more specifications. Ohio Revised Code § 2929.04(A). Next, the jury must return a guilty verdict upon both the charge of aggravated murder and at least one of the specifications. Ohio Revised Code § 2929.03(C).

Upon the return of such a guilty verdict, the jury is discharged and a mitigation hearing is held. The purpose of the mitigation hearing is to determine whether or not three possible mitigating factors exist:

> (1) The victim of the offense induced or facilitated it;
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> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
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> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.
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> Ohio Revised Code § 2929.04(B).

At this hearing the burden of proof by a preponderance is placed upon the defendant. If he cannot prove that one of the three mitigating factors exist, then the Court has no choice but to impose the death penalty. On the other hand, if such proof is forthcoming, then the trial court has no discretion and must sentence the defendant to life imprisonment.

It is also noteworthy that in the state of Ohio a defendant has a right to waive a jury trial and have his capital case tried by a three-judge panel. Rule 23 of the Ohio Rules of Criminal Procedure. In the event that his case is heard by a three-judge panel, all three judges preside at the mitigation hearing and must unanimously agree that the defendant has not met his burden of proof before the death penalty can be imposed. Conversely, if trial was had to a jury, the trial judge alone presides as the trier of fact at the mitigation hearing. In either situation, no findings of fact or conclusions of law are required other than a general finding that the defendant failed to meet his burden of proof upon the issue of mitigation.

If a defendant is convicted of aggravated murder with one or more specifications; has a mitigation hearing in which he fails to meet his burden of proof; and is sentenced to death as required by Ohio law, he may exercise the right to take an appeal through the Ohio courts the same as any other criminal defendant. The sole special provision for the appeal of capital cases is that under Article IV, Section 2 of the Ohio Constitution, he is guaranteed a hearing before the Ohio Supreme Court whereas there is normally only a discretionary appeal.

B

The Ohio statutes violate Petitioner's Fourteenth Amendment rights by placing the burden of proof upon him with respect to the issue of degree of culpability and resulting punishment.

After conviction, a mitigation hearing was held to consider whether Petitioner could prove the existence of any one of the three mitigating factors and thereby save himself from execution. As required by Ohio law,[1] the burden of proof by the preponderance was placed upon Petitioner. T. 6, 14-16, 19.

Petitioner submits that the lack of any mitigating factor is, in reality, an element of the crime and that the state's requirement that he prove the existence of a mitigating circumstance by a preponderance of the evidence violates Petitioner's Fourteenth Amendment due process right to require the state to prove each and every element of the offense beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); in re Winship, 397 U.S. 358 (1970).

This infirmity of Ohio's capital punishment scheme has been raised on three separate occasions, State v. S. Lockett, C.A. No. 7780 (Summit Cty. C.A., March 3, 1976); State v. S. Lockett, 49 Ohio St. 2d 48 (1976); and State v. Hudson, No. 35562 (Cuy. Cty., C.A. March 17, 1976). Only in the latter case did the Ohio Courts recognize the existence of Mullaney v. Wilbur, supra, and make even a superficial attempt to apply the Fourteenth Amendment--as interpreted by Mullaney to the Ohio statutory scheme.[2]

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[1] Ohio Revised Code 2929.03(E):

" . . . if the Court finds . . . that none of the mitigating circumstances . . . is established by a preponderance of the evidence . . ."

Accord: State v. Woods, 48 Ohio St. 2d 127, 135 (1976); Committee Comment to R.C. 2929.03 reprinted in Page's Ohio Revised Code Ann., Title 29 (1975).

[2] In State v. S. Lockett, C.A. No. 7780 (Summit Cty. C.A., March 3, 1976), 15-16 (the relevant parts of this Opinion are set forth at App. 41 to 43 .) the pertinent portions of the Court of Appeals decision upon this issue were as follows:

"Mitigation of sentence has traditionally been a defense function, and the right of leniency has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself . . . ."

In Hudson the State Court of Appeals dismissed the issue in summary fashion concluding that Mullaney was not applicable to Ohio's mitigation hearings because, ". . . the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from the adjudicatory phase . . . ." State v. Hudson, supra, 8-9, App. at 34 to 39 .

This analysis might be correct if the facts developed at the mitigation hearing were to be used by the trial judge in exercising discretion to choose between different sentencing alternatives. But Ohio Revised Code Section 2929.03(E) clearly denies the trial judge any sentencing discretion. If one set of facts exists, then the trial court has no choice but to sentence the defendant to death, while if the other set of circumstances exists, the court must sentence the defendant to life imprisonment.

It is thus apparent that the absence of any of the circumstances set forth in the "mitigation" portion of the statute is a condition precedent for execution. As such, it is an element of the offense which the state must prove beyond a reasonable doubt.

The correctness of Petitioner's position is evident when it is noted that there is a virtual identity between the function of the

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> "We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon."

The response of the Ohio Supreme Court was similar:

> "Appellant's argument misconstrues [sic] statutory sentencing procedures. Appellant's argument would have the state prove the proper punishment. Clearly, the introduction of mitigating circumstances has traditionally been a defense function. What appellant fails to perceive is the fact that her guilt has already been proven by the time of the mitigation stage of the proceedings. The mitigating circumstances listed in R.C. 2929.04(B) relate to the lessening of punishment and are far broader than affirmative defenses which the defense must prove in order to excuse or otherwise justify the commission of an offense."
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> "We find no constitutional conflict in imposing the burden of proving mitigation of punishment on a defendant already adjudged guilty of the commission of a capital offense. This proposition of law is without merit."
> State v. S. Lockett, 49 Ohio St. 2d 48, 65-69 (1976).

"mitigating" circumstances under Ohio law which would reduce the penalty from death to life imprisonment and the existence of "provocation" in Mullaney which would make the difference between a life sentence, on the one hand, and a sentence ranging from a fine to twenty years imprisonment on the other hand. In Mullaney the state--like the Ohio Court of Appeals--attempted to justify placing the burden of proof upon the defendant by arguing that the absence of heat of passion on sudden provocation was not a "fact necessary to constitute the crime" of felonious homicide. The state of Maine--like the state of Ohio in the case at bar--argued that the question of provocation was considered only on the issue of punishment after it was determined the accused was guilty of at least manslaughter. Mullaney at 697, n. 16.

In rejecting that argument, this Court's reasoning pointed out the infirmity that Petitioner believes exists in Ohio's statutes:

> ". . . if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect. . . . It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment." (Emphasis added.)
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> Mullaney v. Wilbur, supra at 697.

The truth of this conclusion is demonstrated by a consideration of Ohio statute making murder (distinguished from aggravated murder) an offense punishable by imprisonment. When the elements of aggravated murder under Ohio Revised Code Section 2903.01(A) are compared with murder under Ohio Revised Code Section 2903.02 it can be seen that the only additional element to be proven is that the death purposely caused was caused with "prior calculation and design." By application of the logic in Hudson the state would be free to change the title of the murder statute to read "aggravated murder;" require the death penalty for the "new" aggravated murder; but provide that one of the mitigating factors which would preclude the imposition of the death penalty would be proof of the absence of any "prior calculation and design." Indeed, if this logic were uniformly applied commonly accepted elements of almost every crime could be removed from the consideration of the jury and rephrased in such a manner as to require the defendant to make such proof in order to mitigate an otherwise harsh sentence.

For this reason Petitioner concludes that the Ohio death penalty scheme is not consonant with the Fourteenth Amendment and the principles enunciated by this Court in Winship and Mullaney.

In the alternative, Petitioner believes that since these fact findings have life or death consequences, the burden of proof must necessarily rest on the state. Since this Court held in Mullaney that our system of justice is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney at 697, 698, Petitioner reads Mullaney to apply to the case at bar even if it were assumed, arguendo, that the proof related only to punishment and not to the essential elements of the offense. For:

> "[U]nder this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result. . . ." (Emphasis added.)
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> Mullaney at 703.

Since "death is qualitatively different from a sentence of imprisonment . . ." and "differs more from life imprisonment than a 100-year prison term differs from one of only a year . . .," Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2992 (1976), it is an intolerable situation when a person in the State of Ohio can be executed when the evidence indicates that it is "as likely as not" that that person deserves to live.

Whether this burden of proof is viewed as being imposed upon the defendant as an "element of the offense," or as a standard for applying the proper penalty, it is evident that it is being applied to the prejudice of Petitioner's constitutional rights. Because of the failure of the Ohio courts to acknowledge the existence of the constitutional issue and to follow the mandate of this Court's decision in Mullaney v. Wilbur, supra, Petitioner submits that certiorari should be granted in order to properly enforce the supremacy clause of the United States Constitution.

C.

The Ohio death penalty statutes violate Petitioner's Sixth, Eighth and Fourteenth Amendment rights to a trial by a jury of his peers.

Petitioner's claim to a right to jury trial upon the factual issue of mitigation which determines whether he lives or dies is based both upon traditional sixth-fourteenth amendment analysis and a separate and independent claim under the eighth and fourteenth amendments.

Petitioner's Sixth Amendment claim is grounded on his right to require the state to prove each and every element of the offense to a jury of his peers. As set forth more fully above, the Ohio capital punishment system requires that an individual be indicted for and convicted of aggravated murder with specifications and that he be unable to prove that he comes within one or more of the three mitigation categories before he can be sentenced to death. Under Ohio Revised Code section 2929.03(C) the factual determination upon the existence of mitigation is taken out of the hands of the jury and ruled upon by the trial judge or a three-judge panel. Since the absence of mitigating circumstances is one of the essential elements of the crime of aggravated murder in which the accused is sentenced to death, he is entitled to a trial by jury upon that issue.

Further, even if it is assumed, arguendo, that the factual determination relates to only an aspect of punishment and not an element of the offense, the resolution of the factual question is of such overriding importance that Petitioner is entitled to have that determination made by a jury.[3/] Indeed, this Court recognized in Mullaney v. Wilbur, supra, at 698, that the determination of facts pertaining to culpability "may be of greater importance than the difference between guilt and innocence for many lesser crimes. . . ." Obviously, the resolution of facts which will determine whether the petitioner lives or dies creates

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[3/] Mullaney v. Wilbur, 321 U.S. 684, 697, 698 (1975): "the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."

such a situation. See Woodson v. North Carolina, supra at 305. Under this circumstance the right to a jury determination of these crucial facts cannot be constitutionally denied to Petitioner. See United States v. Kramer, 289 F. 2d 909 (2d Cir. 1961).

Petitioner also advances a separate and independent claim under the Eighth and Fourteenth Amendments to the Constitution to have the determination of life or death made by a jury. In support of this claim, Petitioner submits the following:

First. The evolving standards of decency that are reflected by the Eighth Amendment can only find proper expression in the context of capital punishment by the existence of jury decision-making upon the issue of life or death. As this Court recognized in Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1967):

> " . . . one of the most important functions any jury can perform in making such a selection [between life imprisonment and capital punishment] is to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." (Citation omitted). (Emphasis added.)

This conclusion was quoted with approval in Gregg v. Georgia, 428 U.S. 153, 181 (1976). Indeed, in Woodson v. North Carolina, 428 U.S. 280, 293 (1976), jury decisions with respect to capital punishment were recognized as one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society."

Further, in Gregg v. Georgia, supra, the jury was found to be a significant and reliable objective index of contemporary value because it is so directly involved. To allow states to exclude the jury from decision making on the issue of death would be tantamount to abandoning the "evolving standards of decency" test of the Eighth Amendment. A decision that jury participation is not required by the Eighth Amendment would thereby allow the state to effectively undermine the force of that amendment by removing one of the two "crucial indicators" of "evolving standards of decency."

Second. The guarantee of a right to a trial by jury is more than an inestimable right--it also "reflects a profound judgment about

the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

Though the authors of the Constitution sought to create a democratic government, they nevertheless provided for the right to trial by jury with the clear intent of protecting "the accused from government oppression." Singer v. United States, 380 U.S. 24, 31 (1965). It was fully contemplated that such oppression might come from the judicial branch as well as from other branches of the government.

As this Court so clearly enunciated in Duncan v. Louisiana, supra at 156:

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against . . . judges too responsive to the voice of higher authority."
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> * * *
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> " . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge.

More recently, in Taylor v. Louisiana, 419 U.S. 522, 530 (1975), one of the purposes of the jury system was recognized as being:

> " . . . to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community . . . in preference to professional or perhaps overconditioned or biased response of a judge. . . . (Citation omitted.)

Because of this fear of judicial power; because of "the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man,[4/] and because "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society," Marion v. Beto, 434 F. 2d 29, 32 (5th Cir. 1970), decisions upon sentencing an accused to death have historically been reserved to the legislature, through mandatory sentencing or to the jury. Where discretion is to be exercised, jury responsibility for the imposition of the death penalty has been recognized as " a principle of justice so rooted in the traditions and conscience of our people as to be randed as fundamental." Snyder v. Massachusetts,

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[4/] A.B.A. Standards, Sentencing Alternatives and Procedures, commentary to § 1.1(c) [Approved Draft (1968)].

291 U.S. 97, 105 (1934).

Because of this deeply rooted commitment to the right of jury trial and the feeling that the decision of life and death was too important to be entrusted in a judge, judges were almost uniformly excluded from the decision-making process by which it was determined who would live and who would die until the confusion resulting from this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972).

Ohio well illustrates the truth of this point. In 1788, the governing body of the Northwest Territory--of which Ohio was a part--enacted statutes providing for capital punishment upon conviction for treason, murder, and arson where death occurs. Upon conviction the death sentence was mandatory: neither judge nor jury had any discretion in the matter. Ch. VI, Laws Passed in the Terr. of the U.S. North-West of the River Ohio.

Though the offenses for which the death penalty was applicable were changed from time to time, the sentence of death continued to be a mandatory one until April 23, 1898. On that date, the jury was vested with the power to preclude the imposition of the death penalty upon one convicted of murder in the first degree. S.B. No. 504 [To amend section 6808 of the Revised Statutes of Ohio.] 92 Ohio Laws 223.[5/] Provisions substantially the same continued until January 1, 1974 when current death penalty statutes took effect giving judges the power of deciding facts which determined life or death for the first time in 186 years.[6/]

[5/] This was part of a trend under which most states abandoned the mandatory death penalty and committed the question of a death sentence to a jury. Because of the repugnance of democratic people to giving an agent of the state, albeit a judge, the power to order death it is not surprising that when state legislatures turned from mandatory to discretionary sentencing procedures in capital cases, it was the jury, and not the trial judge, in whom the discretion was vested. See McGautha v. California, 402 U.S. 183, 200 (1971).

[6/] Ohio's history upon this point would seem to be consistent with that of the rest of the nation. For example, survey of the applicable statutes in 1948 indicated that four states retained a mandatory death penalty; five states had abolished the death penalty, and in 39 states the choice between death and life imprisonment was left to the jury. Andres v. United States, 333 U.S. 740, 767 (1948). At that time no state allowed a judge to participate in making the actual decision as to who was to live and who was to die.

Ohio's departure from this standard seems to have been occasioned by confusion over the meaning of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). When the legislature was making a pre-Furman comprehensive revision of the state criminal code, the first version of the bill which was eventually enacted, provided for a jury determination of whether an individual convicted of aggravated murder would live or die.[7/] This provision was retained in the substitute bill which was later introduced. Though various amendments were proposed to the substitute bill, no one attempted to vest the trial judge with any responsibility for the decision upon capital punishment.[8/] The Court's decision in Furman was rendered after the substitute bill had been passed by the State House of Representatives and was pending before the State Senate Judiciary Committee.[9/] The Judiciary Committee, in its efforts to conform the new provision to what it viewed as the Furman requirement, eliminated the jury from the decision-making process on capital punishment.[10/]

This mistake--though understandable--does not change the underlying difficulty with the statute. Both reason and history suggest that jury decision-making upon the imposition of capital punishment is a value ingrained in both the eighth and fourteenth amendments.

Because the right to a jury trial is so fundamental; because the consequences of the death penalty are so profound; and because Ohio's departure from the time-honored practice of precluding judges from participating in the decision upon whether to impose capital punishment was initiated by confusion engendered by this Court's decision in Furman v. Georgia, supra, review by this Court is merited.

[7/] Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve. St. L. Rev. 8, 16 (1974).

[8/] Id. at 17-18

[9/] Id. at 18.

[10/] Id. at 20.

D

The State has established no compelling state interest which would justify depriving petitioner of his fundamental right to life.

The Massachusetts death penalty was found to be violative of that State's constitution in Commonwealth v. O'Neal, 339 N.E. 2d 676 (Mass. 1975). In his concurring opinion Chief Judge Tauro utilized state due process of law analysis which is equally susceptible to application under the due process clause of the Fourteenth Amendment.

Such analysis highlights one of the major deficiencies of Ohio's attempt to resume the practice of execution and may be summarized as follows:

The Fourteenth Amendment guarantees that states cannot deprive a person of his life without due process of law. Life is the most fundamental right of all: without it an individual would have no rights, fundamental or otherwise. In order to be sustained a statute depriving an individual of a fundamental right must be the least onerous means of furthering a compelling state interest. Thus, a death penalty statute which seeks to deprive a person of his life triggers a strict scrutiny under the compelling state interest and least restrictive means test.

The death penalty serves two principal purposes: deterence of capital crimes by prospective offenders and retribution. Gregg v. Georgia, 428 U.S. 153, 183-185, (1976) (pluarality). While Petitioner does not dispute that society has a compelling state interest in deterence sufficient to imprison those convicted of murder, the results of empiracle studies have been inconclusive as to the deterent effect of the death penalty vis a vis imprisonment. Gregg v. Georgia, supra. There "is no convincing empiracle evidence either supporting or refuting" the view that the death penalty may not function as a significantly greater deterent force than lesser enalties. Gregg v. Georgia, supra at 185.

Consequently, under both the compelling state interest test and the least restrictive means test deterence cannot be utilized to justify the death penalty in lieu of imprisonment. Further, though retribution is not a forbidden objective, it neither requires death in order to be satisfied nor rises to the level of a compelling state interest. Thus, since the State of Ohio is unable to demonstrate any compelling state interest justifying the execution, as opposed to the incarceration of the petitioner, the Ohio statutory scheme is unconstitutional and Petitioner's sentence of execution is void.

E.

This Court should grant certiorari to consider whether the mitigation factors listed in Ohio Capital Punishment Statute are unconstitutionally limited.

Last term, this Court struck down the Death Penalty Statutes in North Carolina and Louisiana, since those states had misread this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972) by attempting to meet the requirements of the Eighth and Fourteenth Amendments by removing all sentencing discretion from the judge and jury. Woodson v. North Carolina, 428 U.S. 280, 300 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The Ohio Legislature, in enacting the state's death penalty statute, also misread this Court's opinion in Furman, supra, since it is clear that the legislative intent was to retain the death penalty, ". . . but to remove from the judge and jury as much discretion as possible in the punishment determination procedure."[11/]

The death penalty statute enacted by the legislature provides only three mitigating factors by which a defendant who has become an automatic candidate for the death penalty[12/] can exculpate himself. The Ohio statute appears to be unique in relation to capital punishment statutes already reviewed by this Court last term. In Ohio the defendant has the burden of establishing by the preponderance of evidence, one of the mitigating factors.[13/] In comparison to the statutes in Florida,[14/] Georgia,[15/] and

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[11/] Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 Cleve. St. L. Rev. 8, 20 (1974).

[12/] Ohio Revised Code 2929.03(D) provides that if the Defendant fails to establish one of the mitigating circumstances by a preponderance of the evidence the Court "shall impose the Penalty of Death on the offender."

[13/] Ohio Revised Code 2929.04(B). The trial judge, in imposing the death penalty in Petitioner's case found that Petitioner had not met his burden of proof. This principle of the defendant's burden of proof at the mitigation hearing was affirmed in the Ohio Supreme Court opinion in State v. Sandra Lockett, 49 Ohio St. 2d 48, 66-67 (1976).

[14/] The Florida statute reviewed by this Court provided seven specific mitigating circumstances, four of which are noticeably not present in the Ohio statute, such as the defendant's age, prior record, his role in the offense, and more broadly defined mental and emotional disturbances and impairments. Proffit v. Florida, 428 U.S. 242, 248 Fn. 6 (1976); see State v. Bayless, 48 Ohio St. 2d 75 at 86-87 (1976) (for comparison of Florida statute with Ohio.

Texas[16] which have passed constitutional scrutiny by this Court, Ohio's mitigation factors are extremely narrow. Thus, the Ohio law does not establish "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (Woodson v. North Carolina, supra, at 428 U.S. 303), but for all practical purposes is a mandatory death penalty.[17]

1.

Even if accepted at face value, Ohio's mitigation provisions are unconstitutionally narrow.

This Court held that the Eighth Amendment ". . . requires consideration of the character and the record of a particular offense . . . ." More recently, this court interpreted Woodson and H. Roberts v. Louisiana, ___ U.S. ___, 21 Cr. L. 3076, 3077 (1977) plurality) to hold that:

> ". . . it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." (Footnote omitted) (Emphasis added.)

See also Jurek v. Texas, 428 U.S. 262, 271-272 (1976).

In H. Roberts v. Louisiana, supra, this Court indicated that:

> "[c]ircumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts. . . ."

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[15] As this Court noted in Gregg v. Georgia, 428 U.S. 158 (1976), the Georgia capital punishment statute allows any mitigating factor provided by law to be presented by the defendant at the sentencing trial, including youth, extent of cooperation with the police, and emotional state at the time of the time of the crime. Gregg, supra, at 428 U.S. 197.

[16] Although the Texas statute did not delineate a mitigating circumstance, this Court recognized by case law that the defendant could present any mitigating factor at his sentencing trial, including age, mental and emotional state, and lack of prior criminal record. Jurek v. Texas, 428 U.S. 262, 273 (1976).

[17] The Ohio Supreme Court has reviewed 20 post-Furman death sentences and reduced none.

But under Ohio law the "mitigating facts" are limited to the three set forth in 2929.04(B). By this severe restriction upon mitigating facts, Ohio has contravened the Eighth and Fourteenth Amendments.

2.

Two of the three mitigating factors provided in the Capital Punishment Statute fail to particularize consideration of the relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.

At the mitigation stage of the trial, the death penalty is mandated unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.
>
> Ohio Rev. Code 2929.04(B).

On its face, the statute only meets the constitutional requirement of "particularized considerations of relevant aspects of the character and record of each defendant before the imposition upon him of a sentence of death" in criteria three. Woodson v. North Carolina, supra, at 303. As to mitigating factor (1), the conduct of the victim in facilitating his own death, clearly the character and record of the defendant has no relevance.

While the defendant's background is relevant to considering the concepts in mitigating circumstance (2) of duress, coercion[18] and strong provocation,[19] its application to the class of death penalty candidates has so far been extremely limited and almost non-existent.

3.

> The sole mitigating factor which addresses the character and record of the accused is illusory and fails to provide an adequate standard by which a defendant can exculpate himself from the death penalty.

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[18] The issue of duress and coercion has arisen in two cases, State v. Woods, 48 Ohio St. 2d 127 (1976), and State v. Bell, 48 Ohio St. 2d 270 (1976). In Woods, supra, the court gave an admittedly broad definition of duress and coercion in application, however, the court appeared to overlook its own definition. In Woods, the defendant had no prior record, was easily led, and was dominated by others, especially his co-defendant, Reaves, who had planned the actual robbery. Since Woods did not abandon his criminal conduct before the shooting (in which case he would have escaped capital punishment altogether) the court did not reduce his sentence. By the same token, in Bell, supra, the court refused to reduce the defendant's sentence although he was only 16, and also easily led by his adult companion, Hall, since he had not abandoned his criminal conduct after the crime was committed. Bell, supra, 48 Ohio St. 2d 282. Both these cases are examples of Ohio Supreme Court's refusal to judge "individual culpability" of each defendant instead of reviewing on the basis of the "category of the crime committed." See Roberts v. Louisiana, supra, 428 U.S. at 222.

[19] The mitigating factor that "it is unlikely that the offense would have been committed but for the fact that the offender was under . . . strong provocation," Ohio Rev. Code 2929.04(B)(2) has not been an issue in any of the twenty (20) capital cases reviewed by the Ohio Supreme Court. The above section is for all intents and purposes identical to the Ohio Criminal Code definition of voluntary manslaughter:

> "No person while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another." (Emphasis added.)
> Ohio Rev. Code § 2903.03.

Thus a defendant in Ohio who kills his victim under serious or strong provocation sufficient to raise a reasonable doubt to the jury would be guilty of voluntary manslaughter and would not be subject to the death penalty. Alternatively, if the defendant was unable to convice the trier of fact at trial that he acted under strong provocation sufficient to raise even a reasonable doubt, it is doubtful if he could convince the trial judge by a preponderance of the evidence at his mitigation hearing. Therefore the availability of this mitigating factor is at best speculative.

The sole mitigating factor which allows the consideration of defendant's background and character is subsection (3) of 2929.04, which allows the defendant to prove that the crime was "primarily the product of "his" psychosis or mental deficiency." Since a "psychotic" offender, in all probability would not be found criminally responsible for his actions, in practice, the consideration of the accused's life and character will turn on the interpretation of "mental deficiency."

The phrase "mental deficiency" in psychiatric terms has been used synonomously with mental retardation. The first death penalty case decided by the Ohio Supreme Court, State v. Bayless, 48 Ohio St. 2d 73 (1976) adopted this interpretation.[20/]

After the Bayless, supra, case, possibly in concern over the scrutiny this Honorable Court would place on the narrowness of the statutory mitigating factors, the Supreme Court enlarged its definition of "mental deficiency." The new interpretation of "mental deficiency" became:

> "Any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself. . . ."
> State v. Black, 48 Ohio St. 2d 262, 269 (1976).[21/]

This reinterpretation, Petitioner submits, is cosmetic only since in light of both the definition in Bayless, supra, and Black, supra, the death

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[20/] Justice Stern, speaking for the Court, held:

> "Mental deficiency is consistently defined to mean low or defective state of intelligence."
> State v. Bayless, supra at 95-96.

[21/] Interestingly, three justices of the Supreme Court (J. Stern, Celebreeze, and W. Brown) while concurring in the judgment in Black, supra, did not concur in the interpretation of "mentally deficient," evidencing a division of the court as to the meaning of mental deficient, if any.

sentences of twenty condemned defendants has found none which fit the category of mentally deficient, no matter how youthful,[22] uneducated,[23] or mentally retarded.[24] Thus this mitigating factor is reserved solely for moron or imbecile, who can demonstrate that the crime was the primary product of that condition.

Furthermore, the accused in Ohio convicted of aggravated murder with specification have the burden of proof in establishing mitigating factors such as "mental deficiency" but as of yet such factors have not been adequately explained by the highest court in the state. Surely a defendant facing a death sentence is entitled to the same constitutional due process rights of adequate notice and definitive standards in statutory wording as an accused faced with any type of criminal charges, to

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[22] The Supreme Court has held that youth is a primary factor going to mental deficiency. State v. Bell, 48 Ohio St. 2d 270 (1977). Invariably the Court has upheld death sentences to minors. State v. Bell, supra (defendant was 17); State v. Harris, 48 Ohio St. 2d 351 (1976) (defendant was 17, with an IQ of 72).

[23] The Court has held that ", , , [E]ducational deficiency does not equate with mental deficiency. State v. Edwards, 49 Ohio St. 2d 31, 47 (1976) (defendant was borderline mentally retarded with an IQ of 72).

[24] State v. Royster, 48 Ohio St. 2d 381 (1970) (defendant had "an IQ of 75 in 1962; 61 in 1966, and 54 in 1968." Id. at 389). See also State v. Edwards, supra (defendant had an IQ of 76); State v. Harris, supra (defendant had an IQ of 72).

safeguard against "arbitrary and discriminatory application" of criminal statutes. Graynod v. City of Rockford, 408 U.S. 104 at 108-109 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). Based on the conscious failure of the Ohio Supreme Court to provide a standard for mitigating circumstances, the Ohio death penalty statute is inherently vague and the ability of the accused to avoid the death penalty is illusory.

F.

The Ohio Courts have failed to properly review Ohio's death penalty cases.

> "It is now clear that the sentencing process as well as the trial itself, must satisfy the requirements of the Due Process Clause."
> Gardner v. Florida, ___ U.S. ___, 20 Cr. L. 3083, 3085 (March 22, 1977).

Plenary appellate review of death sentences serves as an "importatn additional safeguard against arbitrariness and caprice." Gregg v. Georgia, supra, at 2937. The cases of Gregg, Proffitt, Jurek, Woodson, and Roberts have been held to require "meaningful appellate review designed to determine whether the imposition of the death penalty is warranted in any given cases." Jackson v. Mississippi, 337 So. 2d 1242, 1255 (Miss. 1976).

In Ohio a person sentenced to death has an appeal as of right to the Ohio Supreme Court. Section 2, Article IV, Ohio Constitution. But, as demonstrated below, the system of appellate review in the state of Ohio cannot pass constitutional muster.

First. There must be an adequate trial record in order to allow for effective review. To this end, findings of fact and conclusions of law are essential. Ohio has noted the importance of findings of fact and conclusion of law in civil cases, Ohio Civil Rule 52, but has failed to require such information in the much more important fact-finding process under which it is decided whether one convicted of aggravated murder shall live or die. And in the context of a criminal proceeding, it has been held that trial courts should make specific findings of fact to support rulings upon suppression motions, United States v. Gusan, 549 F. 2d 15 (7th Cir. 1977); that such findings are always advisable with respect to the reasons for rendering a particular sentence, United States v. Carden, 428 F. 2d 1116, 1118 (8th Cir. 1970); and that in state speedy trial proceedings "sufficient facts and reasons be set forth in the record to support the court's decision." State v. Messenter, 49 Ohio App. 2d 341, 346 (1976). Indeed, as was said in Gardner v. Florida, ___ U.S. ___, 20 Cr. L. 3083, 3086 (March 22, 1977):

> ". . . Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, ___ U.S. ___, No. 75-506 (July 2, 1976) Slip op., at 7-9, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." (Footnote omitted.)

But the Ohio trial courts continuously fail to make detailed findings necessary for effective appellate review. See generally, Petition for Certiorari in Floyd Edwards v. State of Ohio, U. S. Supreme Court No. 76-6837, pp. 39-40. Their failure in this regard makes effective appellate review difficult, if not impossible, and indicates one major failing of Ohio's capital punishment scheme.

Second. The Ohio Supreme Court itself has shown an indifferent regard for integrity of the record upon which review predicated. In State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) the Court noted:

> "One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record." (Emphasis added.)

In spite of this deficiency; in spite of the Court's admonition to the lower courts that such reports "should" be included in the record; and in spite of its power to supplement the record by ordering the report to be deposited with the Court, e.g., State v. Roberts, 50 Ohio App. 2d 237, 251 (1976), the Ohio Supreme Court proceeded to analyze the merits and affirm the conviction without the availability of the reports.

Third. At least with respect to the case of State v. Edwards, 49 Ohio St. 2d 31 (1976), the Ohio Court below has demonstrated that it did not examine the record with the type of serious scrutiny that should be given to a case which may result in the death penalty.

As set forth more fully, beginning at page 47 of Edwards' petition for certiorari, supra, the Ohio Supreme Court erroneously concluded that a psychiatric evaluation ordered by the trial court was for purposes of determining competency when a close examination of the record would have clearly

revealed that the psychiatrist was asked to, and did in fact, examine Mr. Edwards with respect to one of the mitigating factors which, if established, would preclude imposition of the death penalty.

The Court made a similar mistake with regard to the identity of one Mack Newberry. In attempting to justify the decision of the trial court in allowing officer Ronald Davis to testify for the state, even though his name did not appear on the witness list, the Ohio Supreme Court stated:

> "Although the witness list was incomplete, it did include the name of Mack Newberry, the partner of Ronald Davis, who accompanied him on his tour of duty. It was the intention of the state to call Newberry as its first witness, but a heart attack the night before trial precluded his appearance, and Davis was called in his stead."
> State v. Edwards, 49 Ohio St. 2d 31, 42 (1976).

The transcript clearly shows that Newberry was an individual who lived in the neighborhood where the victim died. Contrary to the conclusions of the court below, Mr. Newberry was a black male, 77 years of age, who was neither a policeman or the partner of officer Ronald Davis. See generally, Edwards' petition at 40-41.

Fourth. Of equal concern is the likelihood that the court below did not devote any serious attention to the briefs prepared by counsel. The mistake with respect to Mr. Newberry was also one which the Court of Appeals had initially made. Upon appeal to the Ohio Supreme Court, counsel for Mr. Edwards pointed this error out in his brief and cited transcript pages which were relevant to that, explaining to the Court that Mr. Newberry was not a police officer. (App. pp. 47-48) In spite of this effort, the error was republished in the Ohio Supreme Court's opinion.

Fifth. In State v. Bayless, 48 Ohio St. 2d 73, 86 (1976) the Ohio Supreme Court indicated that it had:

> ". . . a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." (Emphasis added.)

See also State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) and State v. Strodes, 48 Ohio St. 2d 113, 117 (1976).

In spite of this commitment to "independent review" it is worthy of note that as of this date the Court has not reversed a single case nor reduced a single sentence as a result of its independent review.

Further, it is evident that by "independent" review the Ohio Court does not mean a plenary weighing of the sentencing factors as is done in Florida, e.g., Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). Indeed, the Court has stated:

> "In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. From the evidence before it, the trial court had more than sufficient evidence to support its judgment. (Emphasis added.) (Citation omitted.)
> State v. Edwards, supra at 47.

Since this is the same standard that is applied to all criminal cases, the Court's "independent review" seems to be illusory.

Other deficiencies in the review Ohio accords to those sentenced to death are set forth in each of the substantive arguments advanced by this Petition. Further examples can be expected to be presented on an individual basis as the remaining petitions for certiorari are filed. But Petitioner believes that the foregoing is sufficient to indicate that the Ohio Courts have not taken their duty to review capital cases as seriously as they are required to and to merit more extensive briefing for this Court.

Because the Ohio Courts have not adhered to the high standards of appellate review as Florida, Georgia, and Texas have, the judgment of this Honorable Court is necessary to set forth the constitutional boundaries within which state appellate courts must function when reviewing capital cases.

G.

Ohio capital sentencing procedures impermissibly penalize exercise of the right to trial by jury.

Petitioner submits that the Ohio statutory scheme improperly and unnecessarily penalized the exercise of this right to trial by jury and concurs fully in the apt argument of the law upon this issue submitted by the petitioner in Carl L. Bayless v. State of Ohio, Petition for Writ of Certiorari, U. S. Supreme Court No. 76-____, p. 23:

"United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1911) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme 'needlessly encourages' the waiver of the right to have one's guilt determined by a jury. Id. at 558. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

> 'A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities.'

Rainsburger v. Foglaine, 380 F. 2d 783 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers."

H.

The Ohio statutory scheme for capital punishment contains a substantial risk that capital punishment will be inflicted in an arbitrary and capricious manner.

Initially, Petitioner contends that the Ohio statutory scheme itself is arbitrary and capricious.

First. This is so because the legislature has provided that a murder which results from prior calculation anddesign is aggravated murder without any specification and consequently without any risk of receiving the death penalty. Compare Ohio Revised Code sections 2903.01 (A) and 2929.04. At the same time, the Ohio Legislature mandated that those whose actions take the life of another during the commission of a felony (similar to the common law murder-felony rule) have committed aggravated murder with a specification and consequently may be subjected to the death penalty unless mitigating circumstances are proven by a preponderance. Ohio Revised Code sections 2903.01 (B) and 2929.04 (A)(7). The Ohio statutes thereby operate to preclude from capital punishment the perpetrator of the most premeditated and heinous murder, and at the same time to create a presumption of capital punishment for even the most accidental and unintended death which occurs during the commission of a felony.

Second. The Ohio statutes dealing with the death penalty for felony-murder admit to no particularized consideration of the culpability of the individual when more than one party is involved. It blindly mandates the death penalty for principals and aider and abettor alike, without any regard to their actual knowledge, participation or culpability in the death. E.g., State v. S. Lockett, 49 Ohio St. 2d 48, 67-71 (1976) (O'Neill, C.J., Stern, and W. Brown, J.J., dissenting).

Further, the statutory system is suspect of being applied in an arbitrary and capricious manner.

First. In Ohio, as in most states, the prosecutor has tremendous discretion in determining both the ultimate charge against the accused and in plea bargaining. Petitioner maintains, however, that this inherent

discretion residing in the prosecutor has been greatly and unduly expanded in light of the Lockett, supra decision.[25]

Were it not for the disparity in sentencing that attends each statute, Petitioner would find little fault with the statutory scheme. However, in view of the fact that the death penalty may follow a conviction under O.R.C. 2903.01(B) and the maximum penalty for a conviction under O.R.C. 2903.04(A), involuntary manslaughter, is imprisonment for 25 years. Petitioner submits this constitutes arbitrary and capricious discretion in the prosecutor.

In addition, inasmuch as both statutes have as an element a homicide committed while in the act of committing or attempting to commit a felony, and the element of intent is essentially the same, Petitioner asserts that Ohio has failed to establish any distinction or criteria to aid the prosecutor in deciding under which statute to prosecute an accused. As such, the statutes provide for unbridled discretion in the prosecutor, resulting in unequal treatment for defendants in similar situations.[26]

Ohio is alone among the states of the Union, in vesting its prosecutors with such discretion.[27]

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[25] In the case of State v. S. Lockett, 49 Ohio State 2d 48 (1976), the Ohio Supreme Court held that "a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended and such evidence is sufficient to allow a jury to find a purposeful intent to kill" at 48-49. In essence, this decision has removed the distinction between "purposeful" in O.R.C. 2903.01(B) pertaining to aggravated murder and "proximate results" in O.R.C. 2903.04(B) pertaining to manslaughter.

[26] This Court has found on numerous occasions that the state may not prescribe different degrees of punishment for the same acts committed under similar circumstances. Williams v. Illinois, 399 U.S. 235 (1970); Griffin v. Illinois, 351 U.S. 12 (1956); Yick Wo v. Hopkins, 118 U.S. 356 (1886). See also State v. Zornes, 78 Wash. 2d 9, 475 P. 2d 109 (1970).

[27] By far the majority of the states create a clear distinction between the traditional felony-murder rule and the crime of involuntary or voluntary manslaughter. ALA. CODE title 14, Sec. 314, Sec. 320; ALASKA STAT. 11.15.010, 11.15.040; ARIZ. REV. STAT. 13-452, 13-455, ARK. STAT. ANN. 41-2205, 2209; CAL. PENAL CODE sec. 189, 192(2) (West); COLO. REV. STAT. 18-3-102, 18-3-104; CONN. GEN. STAT. ANN. sec. 53(a) (West); DEL. CODE 11 sec. 636; FLA. STAT. ANN. sec. 782.04, 782.07 (West); GA. CODE ANN. sec. 26-1101, 1103; IDAHO CODE 18-4003, 4006; ILL. REV. STAT. ch. 38, sec. 9-1, sec. 9-3; IND. CODE ANN. 35-42-1-1, 35-42-1-4; IOWA CODE ANN. 35.690.2, 690.10; KAN. STAT. Art. 34, sec. 21-3401; KY. REV. STAT. ANN. sec. 507.020, 507.040; ME. REV. STAT. title 17a, sec. 203; MD. CODE ANN. art. 27, sec. 388, 410; MASS. ANN. LAWS ch. 265, section 1; MICH. STAT. ANN. sec. 750.316, 750.321; MINN. STAT. ANN. sec. 609.185, 609.20; MISS. CODE ANN. 97-3-19,

Second. In Ohio, as in most states, the prosecutor has tremendous discretion in determining both the ultimate charge against the accused and in plea bargaining. Obviously, such discretion encompasses the opportunity for both good faith mistakes and for abuse. The possible constitutional problem with such a system were briefed before this Court in the last two terms. See Fowler v. North Carolina, No. 73-7031, Brief for Petitioner, pp. 45-61; Woodson v. North Carolina, No. 75-5491, Brief for Petitioners, pp. 28-32; Gregg v. Georgia, No. 74-6257, Brief for Petitioner, pp. 18-20; Jurek v. Texas, No. 75-5394, Brief for Petitioner, pp. 29-40.

Though the existence of such discretion alone is not enough to demonstrate a constitutional infirmity, e.g., Gregg v. Georgia, supra, at 2937, Petitioner submits that if empirical data were available which demonstrate that through the exercise of such discretion or its abuse, those individuals who were given the death penalty were selected in an irrational, arbitrary, or capricious manner, then the death penalty of this state would be unconstitutional under this Court's decision in Furman v. Georgia, supra.

The Ohio Department of Mental Health and Mental Retardation keeps detailed statistics upon each Ohio criminal case which traces the history of each case from indictment through disposition and contains other relevant information with respect to age, sex, and race of each defendant. A copy of the form used to collect this data is reproduced in the Appendix at page 46. Though such documents are Public Records to which Petitioner has an

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97-3-27; MO. REV. STAT. sec. 559.010, 559.070; MONT. REV. CODES ANN. sec. 94-2503, 2507; NEB. REV. STAT. sec. 28-401, 28-403; NEV. REV. STAT. sec. 200.030, 200.070; N.H. REV. STAT. ANN. sec 630:1-a, 630:2; N.J. REV. STAT. ANN. sec. 2A:113-1, 2A:113-5; N.M. STAT. ANN. 40A-2-1, 40A-2-3; N.Y. PENAL CODE sec. 125.20, 125.25 (McKinney); N.C. GEN. STAT. sec. 14-17, 14-18; N.D. CENT. CODE sec. 12.1-16-01, 12.1-16-02; OHIO REV. CODE sec. 2903.01(A), 2903.04(A); OKLA. STAT. ANN. title 21 sec. 701, 711; OR. REV. STAT. sec. 163.115, 163.118, 163.125; PA. STAT. ANN. title 18 sec. 2502(a), 2504; R.I. GEN. LAWS sec. 11-23-1, 11-23-3; S.C. CODE sec. 16-3-20, 16-3-60; TENN. CODE ANN. sec. 39-2402, 2409; TEXAS PENAL CODE sec. 19.02, 19.05; UTAH CODE ANN. title 76 sec. 30-3, 30-5; VT. STAT. ANN. title 13 ch. 53 sec. 2301; VA. CODE 18.2-31, 18.2-32; WASH. REV. CODE sec. 9A.32.030, 9A.32.650; W. VA. CODE sec. 61-2-1, 61-2-4, 61-2-5; WIS. STAT. ANN. sec. 940.03, 940.05, 940.06; WYO. STAT. title 6 sec. 6-54, 6-58.

absolute right of access, see Ohio Revised Code Section 149.43, as of the date of the preparation of this petition he has been unable to convince that agency of the state to allow him access to such information. Nevertheless, Petitioner will obtain that data either by agreement or mandamus. Based upon partial statistics that Petitioner has gathered through the cooperation of the courts in sixty of Ohio's eighty-eight counties, Petitioner submits, upon information and belief, that the more complete and reliable statistics in the possession of the State of Ohio would be relevant to whether or not Ohio's statutory system of capital punishment is being utilized in an arbitrary and capricious fashion.

Third. There have been instances where a death sentence has not been imposed because a mitigating circumstance was found. Given the illusory nature of the mitigation portions of the Ohio statute as discussed above, this raises the question of whether judges in the state of Ohio are acting in such a manner as to make the death penalty in Ohio one that is arbitrary and capriciously imposed. This can be easily ascertained by reference to the transcripts once those mitigated cases are identified through the information in the possession of the Ohio Department of Mental Health.

Accordingly, Petitioner asks that this Court consider the fact that the Ohio statute itself mandates arbitrary and capricious infliction of death and to evaluate statistical data concerning Ohio's current statutory scheme in order to determine whether that penalty is being applied in an arbitrary or capricious manner.

II.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF THE TESTIMONY OF A POLICE DETECTIVE CONCERNING A CONFESSION OF AN ALLEGED CODEFENDANT MADE TO A FELLOW OFFICER AND THAT FELLOW OFFICER'S EXPERIENCE WHEN CONFRONTING THE PETITIONER WITH THE CONFESSION WHICH IMPLICATED THE PETITIONER AS THE "TRIGGERMAN" IN A CRIME IN WHICH HE HAD CONTINUALLY DENIED ANY INVOLVEMENT, WAS VIOLATIVE OF THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT OF CONFRONTATION WHEN NEITHER THE FELLOW OFFICER NOR THE ALLEGED ACCOMPLICE TESTIFIED AT TRIAL; AND WHETHER THIS WAS REVERSIBLE ERROR IN THAT IT CONTRIBUTED SUBSTANTIALLY TO THE PETITIONER'S CONVICTION AND THERE WAS NO OTHER OVERWHELMING EVIDENCE OF GUILT.

At the trial and during the prosecution's case-in-chief, Detective Edward Duvall, Jr. of the Akron Police Department was called to the stand and testified regarding the course of the custodial interrogation of the Petitioner herein. Duvall related a conversation between the Petitioner and another police detective, Captain John Traub. Over the continuing objection of the Petitioner, Duvall was permitted to testify that Traub informed Petitioner that his accomplices (Delbert Richmond and William Pitts) had been arrested, and that both of them had identified him as the triggerman, T. 790-791.

It is critical to note at the outset the Supreme Court of Ohio's finding that the trial Court erred in admitting Detective Duvall's account of Traub's experience. State v. Perryman, 49 Ohio St. 2d 14, 358 N.E. 2d 1040 (1976). The Petitioner maintains that the Supreme Court of Ohio correctly held that the alleged statements by Pitts, made as an accusatory statement by Traub, and testified to by Duvall, was hearsay and violative of the Petitioner's constitutional right to confrontation, as Traub and Pitts were not called upon to testify.[28/]

[28/] The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 at 403 (1965) and to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process. Pointer v. Texas, supra, at 405. See also Douglas v. Alabama, 380 U.S. 415 (1965). Here, as noted by the Supreme Court, the trial court admitted the confession of a co-defendant (Pitts) who did not take the stand to testify and thereby clearly denied the Petitioner's Sixth and Fourteenth Amendment right of confrontation. State v. Perryman, supra. See also Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, supra; Douglas v. Alabama, supra.

This error was all the more grievous because while this was an in-custodial interrogation, the testimony at issue did not involve a question asked by the police officer. Rather, Detective Duvall's hearsay testimony indicated that Captain Traub made a strong accusatory declaration about facts over which he had no personal knowledge. By allowing this hearsay testimony to come before the jury, the State of Ohio not only prejudiced the Petitioner's substantial constitutional rights, but gave sanction to a contrivance by which the jury can be appraised of accusatory statements made by police officers during interrogation without respect to whether or not the police officers had personal knowledge of the facts contained therein, and without respect to the truth or the falsity of the content of those declarations. Such wholly unfounded and unreliable testimony cannot be admitted at trial without prejudice to the accused. For this reason, Petitioner submits that the findings of the Ohio Supreme Court that this constitutional violation amounted to harmless error is clearly erroneous and will not stand the test of any serious constitutional scrutiny.

The Ohio Supreme Court admitted, in its opinion, that it is commonly accepted that "a defendant is entitled to a fair trial, but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619 (1953). The admission of Pitts' confession added critical weight to the state's case in a form not subject to cross-examination and such admission constituted prejudicial, reversible error. Absent this opportunity to cross-examine Pitts, the Petitioner was deprived of his guarantee that the fact finder have adequate opportunity to assess the credibility of the crucial witnesses at trial. Bruton v. United States, supra. See also Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968). Since the erroneously admitted testimony was used as the chief corroborating evidence to the testimony of Delbert Richmond, the state's pivotal witness, the harmfulness of the error becomes more evident. This is especially true when the testimony being corroborated is that of a convicted felon, who prior to testifying against the Petitioner had changed his position from one of nonparticipation in the crime to one of an accomplice. T. 629.

The Ohio Court reached its decision of harmless error upon a reading of Brown v. United States, 411 U.S. 223 (1973); Schneble v. Florida, 405

U.S. 427 (1972); and Harrington v. California, 395 U.S. 250 (1969). All of these cases involved the use at trial of codefendants' confessions in clear violation of the law expressed in Bruton v. United States, supra. In all three cases the Court found that there was error but held such error to be harmless beyond a reasonable doubt. The petitioner maintains that due to clear, factual, and legal distinctions, the present case is easily removed from the cases on which the Supreme Court of Ohio erroneously relied.

In Brown v. United States, supra, the Court found that the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the Court. Brown v. United States, supra, 411 U.S., at 231. Such is not the situation in the present case. Absent the erroneously admitted statement of Pitts, the testimony of Richmond, the State's key witness and alleged co-participant in the crime, would have lacked sufficient support and corroboration as to find Petitioner guilty beyond a reasonable doubt. In fact, absent this erroneously admitted testimony, the other "corroborating" evidence would be wholly inadequate and largely controverted.[29]

In Schneble, this Court held that to be harmless there must be "Properly admitted evidence of guilt [is] so significant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." 405 U.S., at 430. It is quite understandable that this Court found harmless error in Schneble. The defendant therein admitted to the police that he had strangled the victim. This Court justly found that:

> ". . . the petitioner's account of the offense were internally consistent, were corroborated by other objective evidence and were not contradicted by any other evidence in the case . . . . the allegedly inadmissible statements of Snell at most tended to corroborate certain details of petitioner's comprehensive confession."
> Schneble, at 431.

In the case herein, there was no independent confession by the defendant, nor was there even any admission of presence as in Harrington.[30]

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[29] The discrepancies and lack of reliability identification testimony by the witness Alldredge will be enumerated in Section IV. Other examples of controverted evidence are prevalent throughout the transcript.

[30] "The petitioner made statements which placed him at the scene of the crime. He admitted that Bosby was the triggerman, that he fled with the other three; and that after the murder he dyed his hair black and shave off his moustache."
Harrington, 395 U.S., at 252-253.

The defendant has steadfastly denied any involvement or presence at the crime. When one analyzes the quality of the other evidence, one cannot reasonably contend that the evidence properly admitted by the trial court herein is so overwhelming that it renders the Pitts confession insignificant by comparison.

Aside from the testimony of Richmond and Alldredge, who both suffered greatly from a lack of credibility, the other evidence was circumstantial[31/] and it was far from overwhelming.

Nor can it be concluded, justly on the facts herein, that there is no "reasonable possibility that the improperly admitted evidence contributed to the confession." Schneble, 405 U.S. at 432.

In determining if such a reasonable possibility exists, this Court has found that the "harmless error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions stares us in the face." Schneble, 405 U.S. at 432.

Here the jury made but one inquiry during its deliberations, to wit: "Would guilt on specification one indicate that the defendant was the triggerman?" T. 975. The one and only time, in substantive evidence, the phrase "triggerman" was used, was by Detective Duvall where he stated Captain Traub (who did not testify) stated Richmond and Pitts (Pitts did not testify): "[I]mplicated him as the triggerman." T. 791.

It is obvious, as stated in Schneble, supra, that it "was considered by the jury." In judging its impact, Harrington determines that it must be harmless beyond a reasonable doubt based upon each individual record. As stated in Harrington, at 254:

> "We do not depart from Chapman; nor do we dilute it by inference. We do not suggest that, if evidence bearing on all the ingredients is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based upon the evidence in this record." (Emphasis added.)

31/ The Court in disregarding the confessions of the codefendants in Harrington, found that the evidence against the defendant, consisting of direct testimony as opposed to circumstantial evidence, was so overwhelming that the violation of Bruton v. United States, supra, was harmless beyond a reasonable doubt. Unlike Harrington's, the case agains the Petitioner, excluding the erroneously admitted testimony used to corroborate Richmond's testimony, was "woven from circumstantial evidence." Harrington, at 254.

The Supreme Court of Ohio Stated simply that the evidence erroneously admitted was "merely cumulative of other corroborating testimony properly before the jury." Perryman, 49 Ohio St. 2d at 19. With all due respect, it appears fairly evident that the Supreme Court of Ohio never paused to consider or even inquired into, the degree of impact the confession of Pitts had on the jury.[32/] Nor did it consider in any adequate manner the inherent weaknesses in the remainder of the state's case.

By erroneously relying on Brown, Schneble, and Harrington as authority, the Supreme Court of Ohio concluded that an admitted violation of the right to confrontation; though patently prejudicial and having a direct impact on the jury's decision, was harmless error beyond a reasonable doubt. In a capital case, where death is the determined penalty, such frivolous consideration of errors of constitutional dimensions cannot be tolerated.

[32/] Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Marshall joined, dissenting in Harrington v. California, supra, pointed out the prejudice involved whenever a Bruton violation occurs:

> "Even assuming there was more than ample evidence to establish Petitioner's participation in the crime, a jury might still have concluded that the case was not proved beyond a reasonable doubt. The confessions of the other defendants were less self-serving and might well have tipped the balance of the jurors' minds in favor of conviction. Certainly, the State has not carried its burden of demonstrating beyond a reasonable doubt that these two confessions did not contribute to petitioner's conviction."
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> Harrington v. California, supra at 217.

III

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION INTO EVIDENCE IN THE PROSECUTION'S CASE IN CHIEF OF TESTIMONY THAT AFTER RECEIVING MIRANDA WARNINGS AND DURING THE COURSE OF INTERROGATION, THE PETIONER EXERCISED HIS RIGHTS TO REMAIN SILENT AND TO CONFER WITH COUNSEL, SO PENALIZED THE PETITIONER FOR EXERCISE OF SAID RIGHTS THAT HE WAS DENIED THE PROTECTIONS OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

At trial and during the prosecution's case-in-chief, Detective Duvall of the Akron Police Department was called to the stand and testified regarding the course of the custodial interrogation of the Petioner herein. Detective Duvall stated that the Petitioner was twice given his Miranda warnings from the standard card,[33] and included therein was the statement that the Petitioner "could stop at any time and exercise these rights, and not answer any further questions, and not make any statements." T. 789. The Detective stated that when asked if he understood these rights, the Petitioner answered affirmatively, indicated that he would speak, and denied any knowledge of the homicide when questioned. T. 790. Over a continuing objection of defense counsel, Detective Duvall was then permitted to testify that during the course of the interrogation, and when confronted with an alleged accomplice's accusation that the Petitioner was the triggerman in the homicide being investigated, the "Defendant appeared nervous and hesitated, and then stated that he wished to have an attorney." T. 792.[34] A motion for mistrial based on the admission of this latter testimony as violative of the Petitioner's rights was overruled. T. 825.

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[33] "You have the right to remain silent . . . . Anything you say can and will be used against you . . . . You have the right to talk to a lawyer and have him present with you while you are being questioned . . . . You can stop at any time and exercise these rights, and not answer any questions, and not make any statements.

[34] This portion of Detective Duvall's testimony was as follows:

Q. What did Captain Traub say; relate the conversation that happened then?

A. Captain Traub informed Mr. Perryman that he was under arrest for the aggravated murder of Lawrence Busch which occurred on November 27, 1974, which occurred in the Star Market parking lot on South Arlington Street.

At this time, Mr. Perryman stated he didn't know anything about a murder. Captain Traub at that time stated, "Well, I am going to lay it on the line." He stated that, "We have arrested Richmond; we have arrested Pitts."

It is somewhat difficult to determine whether the Supreme Court of Ohio, in its at times alarming fashion, merely 'missed' the serious constitution issues presented herein; or whether, in painful awareness of them, the Court just desperately thrashed about to find a means of avoiding reversal of the conviction. The latter seems to be the more likely explanation for the Court's wholly untenable conclusion that the Petitioner's argument herein was "without merit."

Although the Ohio Supreme Court refused to acknowledge it, the trial court's rulings in admitting this testimony and refusing to grant a mistrial thereon were clearly erroneous as the prosecution's use of the assertion and exercise of the Petitioner's right to remain silent and to confer with counsel cannot withstand scrutiny under the Fifth, Sixth,[35/] and Fourteenth Amendments.

The Fifth Amendment privilege against self-incrimination, as incorporated through the Fourteenth Amendment due process clause and applied to the

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MR. CALHOUN: Now, just a minute. Check this at this point. May we approach the bench, please?

(THEREUPON, Mr. Kirkwood, Ms. Boyer, Mr. Thompson, and Mr. Calhoun approach the bench and have a discussion with the Judge out of hearing of the jury.)

MR. KIRKWOOD: Overruled, Your Honor?

COURT: Yes.

(THEREUPON, the following was offered for the record by Mr. Calhoun out of the hearing of the jury.)

MR. CALHOUN: Just state this line of conversation between Captain Traub and the Defendant, William Perryman, at this point I just want a continuing objection so as not to interrupt the line of questioning.

(THEREUPON, the following proceedings were held in the hearing of the jury.)

Q. Detective Duvall, I would like you to start again where Captain Traub says to the Defendant, "I am going to lay it on the line." Go ahead.

A. He stated, "I am going to lay it on the line." He said, "We have arrested Pitts; we arrested Richmond, both had told their stories. Both had implicated him as the trigger man," and Captain stated that we would like to hear his story. He then stated that we have traced Mr. Perryman, a gun purchase of a .38 caliber Blue Seal revolver which was purchased the day before the homicide in Barberton, Ohio.

At this time, the Defendant appeared nervous and hesitated, and then stated that he wished to have an attorney. T. 792.

35/ The Petitioner stated a desire to speak with counsel, and testimony indicating this fact was a denial of the Sixth Amendment right to counsel at it penalized the exercise of said right. The right to counsel's presence in the

states in Malloy v. Hogan, 378 U.S. 1 (1964), prohibits presecutorial comment on the defendant's silence at trial, Griffin v. California, 380 U.S. 609 (1965). The rationale expressed in the Griffin case is that comment constitutes "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S., at 614. This Court then forbid any judicial imprimatur to be placed on such practice.

> "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."
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> 380 U.S., at 614.

A prosecutor's act in calling attention to one's exercise of his rights during custodial interrogation would appear to be equally, if not more, prejudicial to the accused. In the trial context, the jury will likely be aware of the defendant's silence even without prosecutorial comment thereon, as it will be apparent that he has not testified in the proceedings. The jury has no means of discovering, however, whether or not the defendant remained silent in the face of accusation in custodial interrogation. There is thus no opportunity for the jury to draw any negative inferences from exercise of one's right to remain silent at interrogation, unless the prosecutor, with the approval of the court, should bring it to their attention. It is only then that any penalty can attach.[36/]

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custodial interrogation setting is generally recognized as being a prophylactic device "indispensable to the protection of the Fifth Amendment privilege" and necessary to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." Miranda v. Arizona, 384 U.S. 436 (1966), at 469. Pursuant to the Miranda decision, when an individual requests an attorney, the interrogation must cease until an attorney is present, Miranda, 384 U.S., at 474. Therefore, the assertion during interrogation of one's right to confer with counsel operates as, and becomes equivalent to, the assertion of the Fifth Amendment right. It was properly so understood by the interrogating officers herein, who promptly ceased their questioning upon Petitioner's request for counsel. T. 792. See Baker v. United States, 357 F. 2d. 11 (5th Cir. 1966).

[36/] The federal courts, possibly as an outgrowth of the no-comment on silence at trial rule enunciated in Wilson v. United States, 149 U.S. 60 (1893) have repeatedly held that the Constitution forbade use by the prosecution of the defendant's silence in the face of accusation during interrogation. See United States v. Lo Biondo, 135 F. 2d. 130 (2nd Cir. 1943); Helton v. United States, 221 F. 2d. 338 (5th Cir. 1955). Whether or not the privilege was asserted during custodial interrogation or at trial, the courts recognized that "most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." Walker v. United States, 404 F. 2d 900 (5th Cir. 1968). There is thus very little difference between the prejudice resulting from the testimony admitted in regard to a defendant's exercise of rights in the

This Court has recognized the potential for penalties attaching to the assertion of rights in this context and has implicitly expanded the Griffin rationale to encompass the police interrogation setting. In Miranda v. Arizona, this Court stated:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."
> 384 U.S. at 468, n. 37.

The proscription concisely set out in Miranda was blatantly ignored by the prosecution in the case herein. The prosecution gave a patent verbal invitation to the jury to consider the Petitioner's silence as evidence against him. Testimony regarding the Petitioner's assertion of his rights to remain silent and to counsel was adduced in the prosecution's case-in-chief to serve solely as substantive evidence of his guilt.

No other justification for its admission can be contended. This Court recently wrestled with the Ohio practice of permitting impeachment of the defendant's testimony at trial by cross-examination as to his silence at the time of arrest. Doyle v. Ohio, 426 U.S. 610 (1976). The "necessity" pleaded "as justification for the prosecutor's action" in calling attention to the defendant's exercise of his rights was "the need to present to the jury all information relevant to the truth of Petitioner's exculpatory story." 426 U.S., at 616-617. This Court noted that "despite the importance of cross-examination" 426 U.S., at 617 in preventing frustration of the truth-seeking function of a trial, the giving of the Miranda warnings precluded cross-examination on one's post-arrest silence, as it would be fundamentally unfair and a deprivation of due process "to undertake impeachment on the basis of what may be the exercise of one's rights." 426 U.S., at 619, n. 10. (Emphasis added.) The error, as perceived by this Court was the prosecution "implying an inconsistency that the jury might construe as evidence of guilt" 426 U.S.,

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post-arrest context, and a prosecutor's comment before a jury on a defendant's exercise of his constitutional rights. United States v. Nolan, 416 F. 2d. 588 (10th Cir. 1969); Baker v. United States, 357 F. 2d 11 (5th Cir. 1966); United States v. Kroslack, 426 F. 2d. 1129 (7th Cir. 1970.)

at 619, n. 10, (emphasis added) from silence which was "insolubly ambiguous."[37] 426 U.S. at 617. This Court recognized the penalty Ohio was attaching to Doyle's exercise of his constitutional rights, and found a denial of due process as the assurance that silence, "will carry no penalty . . . is implicit to any person who receives the (Miranda) warnings," 412 U.S., at 618.

If this Court has found a violation of due process results even when the value of cross-examination is a complicating factor in the case, it is abundantly clear that when the prosecutor uses a defendant's silence at interrogation in its case-in-chief, this Court would not hesitate to find error of constitutional dimension.[38]

It is somewhat bewildering to counsel that in spite of the plethora of cases rather firmly establishing the constitutional bar to the state's prosecuting alleged criminals by means of evidence of their silence, the Supreme Court of the state of Ohio, barely six months after this Court's decision reversing the impeachment by silence practice in Ohio as unconstitutional, proceeded to find that the Petitioner's constitutional rights were not denied him. In the Brief for Petitioner filed in Doyle v. Ohio, at pages 18-19, a highly respected attorney from the state of Ohio asked this Court to "chart a course" regarding the use of post-arrest silence at trial that would "hopefully . . . be both clear and precise" so that the Ohio courts would not continue "to ratify abuses" of the constitutional rights of its citizens. Apparently, this Court's rather clear and precise admonitions have again gone unheeded by the Ohio courts, and unfortunately, this Court is again faced "with a patent example of the unwillingness of the Ohio . . . courts to vindicate, at the expense of reversing a conviction, the rights (this petitioner) had to a fair trial." Brief for petitioner in Doyle v. Ohio, at p. 19.

In its grudging view of the concepts of individual rights, the Ohio Supreme Court ruled that the Petitioner had not been denied his constitutional right to remain silent guaranteed by the Fifth, Sixth, and Fourteenth Amendments because:

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[37] See United States v. Hale, 422 U.S. 171 (1975).

[38] Even the dissenting Justices in Doyle v. Ohio would appear to agree that when "the need to insure the integrity of the trial by the traditional truth-testing devices of the adversary process," 426 U.S., at 630, n. 8, is not at issue, a direct inference of guilt from post-arrest silence should not be permitted to be drawn. See the dissenting opinion of Mr. Justice Stevens 426 U.S., at 634-635. Of course, such an inference cannot be drawn unless testimony relating to the assertion of one's rights is introduced by the prosecution, and the silence is thereby called to the attention of the jury.

> "[A]t the time appellant (petitioner) was interrogated by Detective Duvall, he had intelligently, knowingly, and voluntarily waived his Miranda rights," and "[H]aving done so, it is inconsistent for him to say that (introduction of) his appearance and responses during the interrogation violated his Fifth and Sixth Amendment rights."
> State v. Perryman, 49 Ohio St. 2d 21 (1976).

By relying on the waiver concept,[39/] the Supreme Court concluded that "this argument is without merit." With all due respect to that Honorable Court, the Petitioner contends that its decision is without legal basis and represents yet another attempt to circumvent application of clear constitutional doctrines.

This Court enunciated most clearly in Miranda that "if at any time prior to or during questioning" the accused indicates that "he wishes to remain silent, the interrogation must cease." (Emphasis added.) 384 U.S., at 473-474. See also Michigan v. Moseley, 423 U.S. 96 (1975). One's right to remain silent is thus not forever lost and irretrievable if he should decide to initially speak with his interrogators. He can exercise his rights at any time. The Ohio Supreme Court's ruling that as Petitioner had seemingly initially waived his rights, he cannot complain of constitutional violations

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39/ The Ohio Supreme Court appeared to rely on a previous decision of that Court, State v. Stephens, 24 Ohio St. 2d 76 (1970), in reaching its decision herein. The Stephens case asked whether a defendant who chose to take the stand at trial could then be considered to have waived the privilege against self-incrimination he had asserted in pre-trial proceedings, so that the prosecutor could then comment in oral argument upon defendant's silence during these earlier stages of the accusatorial process. 24 Ohio St. 2d, at 79. The Court looked to various federal cases where comment was made on the failure to give an exculpatory story at an earlier point. The Court then found that "Prosecution references to that silence, or any inferences therefrom, are not permissible, unless the record clearly demonstrates by the action and testimony of the defendant that he has waived the privilege previously asserted." 24 Ohio St. 2d, at 82. The Supreme Court of Ohio then concluded (correctly, one could contend, based on Griffin and Doyle, supra) that in taking the stand the defendant could not be considered to have "waived the privilege (he had) previously asserted." 24 Ohio St. 2d, at 82. In the only Supreme Court case interpreting this aspect of Stephens prior to Perryman, the Court ruled in State v. Young, 27 Ohio St. 2d 310 (1971) that when a defendant, on examination by his own counsel, testifies that he chose to remain silent during in-custody interrogation, this testimony did constitute a "waiver of the privilege previously asserted" under the Stephens rule such that the prosecutor could permissibly comment on his earlier silence.

when those rights are later specifically asserted and such assertion is commented on at trial, is wholly unacceptable.[40/]

Furthermore, the Petitioner herein was clearly informed that he could "stop at any time and exercise these rights," T. 789. Like the petitioner in Doyle, he was thus assured by the warnings given him that the exercise of his right to silence at any point would carry no penalty. A contrary holding must be found to violate due process.

The Supreme Court of Ohio has once again succeeded in ignoring plainly reversible error. As this Court has not yet charted as clear and precise a course as appears to be necessary to vindicate the rights of those who choose at some point during interrogation to exercise their rights, and later find themselves subject to a penalty by use of said silence in evidence against them in the prosecution's case-in-chief, it behooves this Honorable Court to accept certiorari to clarify the applicability of the Miranda, Griffin, and Doyle doctrines in this context. Hopefully, then, arrestees will not continue to find themselves in a partially uncharted sea, subject to the whimsical billowing of individual courts.

[40/] Two circuit courts considering this issue have so recognized, in United States v. Ghiz, 491 F. 2d 599 (1974), the Fourth Circuit found that an accused's refusal to answer certain questions during interrogation and assertion of the privilege thereto, could not be commented on at trial during the prosecution's case in chief. The circumstances in the case herein are even more compelling, as a general refusal to answer any further questions was made. In this regard, the instant case is more closely akin to Booton v. Hanauer, 541 F. 2d 296 (1976), in which the First Circuit found constitutional error in introduction of the petitioner's eventual refusal to answer further questions.

As was forcefully stated in the Petitioner's Motion for Rehearing before the Supreme Court of Ohio:

> "Here the defendant (even if he waived) reasserted his right to silence upon accusation that he was the triggerman . . . . While comment may be permissible as to what he said, within the context of the inquiry made (if one is made), no reference can be made to his assertion of a Constitutional right and/or silence. The State may clearly indicate that the inquiry stopped. However, the State is precluded from showing it stopped because the defendant asserted his right to remain silent. This attaches significance, generally adverse, to the assertion of an unfettered Constitutional right protected and guaranteed by the Fifth Amendment."
>
> "If this were not the case, every interrogation initiated could conclude with a narrative accusatory statement which, if the defendant elected silence, would be recounted with evidence placed before the jury that, in the face of the accusation (rather than the question), the defendant remained silent and requested counsel. That is precisely what Griffin, supra, sought to avoid."
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> Petition for Rehearing, at pp. 4-5.

IV.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER, WHEN IDENTIFICATION TESTIMONY IS SOUGHT TO BE ADMITTED AT A CAPITAL TRIAL, STRICTER SCRUTINY OF SUCH TESTIMONY'S RELIABILITY IS REQUIRED TO MEET THE DEMANDS OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, AND WHETHER, IN ANY EVENT, THE DUE PROCESS CLAUSE MANDATES EXCLUSION OF THE IDENTIFICATION TESTIMONY HEREIN.

Over the past several years, this Court has had several occasions to consider the vagaries of eyewitness identification, and has concluded, most recently in Manson v. Brathwaite, ___ U.S. ___, 21 Cr. L. 3120 (June 16, 1977) that "reliability is the linchpin," Manson, at 15, in the due process analysis determining the admissibility of identification testimony. "It is the likelihood of misidentification which violates a defendant's right to due process," Neil v. Biggers, 409 U.S. 188 (1972), at 198, and thus this Court has identified five factors[41/] which are to be weighed against "the corrupting effect of the suggestive identification itself," Manson, at 3124, in determining admissibility.

It is Petitioner's contention that the identification procedures in a capital case should be subject to somewhat greater scrutiny with regard to their reliability, than that afforded in cases where the penalty of death, "unique in its severity and irrevocability, " Gregg at 187 , is not present. This Court has recognized that "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed," Gregg, id. Courts and legislatures have also long recognized that additional safeguards are necessary to insure reliability in the guilt determining process in capital cases.[42/] Where an individual's life thus hangs in the balance,

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[41/] These factors are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness" degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Neil at 199-200.

[42/] As an example, the Rules of Criminal Procedure of both Ohio and the Federal Courts provide several areas of distinction between capital and

Petitioner contends that an analysis of the reliability in the "totality of the circumstances," Stovall v. Denno, 388 U.S. 293 (1967) must include judicial recognition of the fact that an erroneous determination of guilt in this instance will not be in any sense curable. Although the annals of criminal law are rife with instances of mistaken identification,[43] United States v. Wade, 388 U.S. 218 (1967) at 228, this society cannot tolerate erroneous findings of guilt in capital cases. To insure, as far as humanly possible, that innocent persons are not executed in this country, closer scrutiny by the judiciary of identification testimony prior to its admission is essential. Support for this contention that closer scrutiny is required in determining the admissibility of identification testimony in capital cases may be found in this Court's earlier identification cases.[44]

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non-capital offenses on matters touching the reliability of the guilt determining process: need for an indictment, O.R. Crim. P. 7(A), F.R.G.P. 7(a); relief from prejudicial joinder, O.R.Cr.P. 14. (See also O.R.C. §2945.20); number of preemptory challenges to the jury, O.R.Cr.P. 24(C)(G), F.R.Cr.P. 24(b); and providing for an appeal of right in capital cases, Art. IV, §2, Ohio Constitution.

[43] See generally Borchard, Convicting the Innocent (1932); Wall, Eye-Witness Identification in Criminal Cases (1965); Frank & Frank, Not Guilty (1957), and other volumes noted in People v. Anderson, 205 N.W. 2d 461 (Sup. Ct. Mich., 1973) at 472.

[44] In defining the due process guarantee in this context, this Court has referred to two possible findings: that the confrontation conducted is "unnecessarily suggestive and conducive to irreparable mistaken identification," Stovall, at 301-302, and that it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," Simmons v. United States, 390 U.S. 377 (1968), at 384. The Stovall test can be read as requiring a lesser probability of misidentification, or, that there merely be a showing that the procedures were "conducive to mistaken identification." "Conducive" is defined as "of conducting nature or quality, tending to promote," Webster's Third New International Dictionary, and thus it can be contended that a tendency toward misidentification is all that need be shown. The Simmons test, used extensively in this Court's later cases, could be argued to require a greater probability of unreliability, i.e., a "very substantial likelihood." It is thus perhaps not insignificant that of all this Court's cases considering identification testimony, Stovall was the only case which presented a capital charge, murder, and was the sole case where the death penalty had been imposed upon the accused. Stovall, at 296.

This Court may thus find it unnecessary to fashion a new test to assure greater reliability in capital cases. It could simply reaffirm the distinction established by its previous cases. A distinction based on the extreme seriousness of the crime and the severity of the penalty is not unknown in this Court's consideration of constitutional protections given to the accused. See Powell v. Alabama, 287 U.S. 45 (1932) and Betts v. Brady, 316 U.S. 455 (1942).

Whether or not this Court should agree with Petitioner's contention that capital cases require a stricter standard of reliability be applied to the question of admission of identification testimony, the Petitioner argues that this Court cannot fail to find a sufficient likelihood of misidentification exists in the instant case to require exclusion of the identification testimony.[45/]

At trial Michael Alldredge, the only identification witness other than the alleged co-participant Richmond, was permitted to make an in-court identification of the defendant and to testify as to a prior (pre-trial) out-of-court identification. Alldredge was at the scene when the Busch homicide occurred on November 27, 1974, where he observed a black male and the deceased having some sort of altercation, turning away immediately prior to the shooting. T. 735. Soon after the crime he gave a description to the Akron police of this individual.[46/]

At the trial, Alldredge testified that he was approximately 30 feet from the individual, T. 746, had seen only a side profile of him, T. 737-738, and that it was "dark out," T. 746, and that he was surprised, nervous and frightened at the time of his observation, T. 859, 860. The witness had difficulty recalling the description he had given regarding the individual's weight.[47/] The description given differs substantially,

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[45/] The Supreme Court of Ohio used the Simmons test in reviewing the trial court's admission of the identification testimony herein. The Court referred to the language in Simmons, at 384, that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and concluded that "applying the test in Simmons" the Court found "[T]he inconsistencies in Alldredge's testimony do not indicate an identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Perryman, 49 Ohio St. 2d at 22-23.

If this Court should consider the Simmons test to be the appropriate one in a capital case, Petitioner contends that the conclusion reached by the Ohio Supreme Court was wholly erroneous.

[46/] The description given the police was that of a: "Negro Male;" Height - "6'4" to 6'5";" Weight - "235-240 - a very large individual;" Facial features - He did not know whether this person "had any facial hairs, beard or mustache;" Clothing- "individual wearing a blue cap, dark jacket. He (witness) didn't elaborate too much;" Attention given to facial features -"He (witness) didn't pay too much attention to facial features." T. 859, 866.

[47/] "I just don't remember exactly what I said. I know it was high. It was up there, it wasn't . . . Maybe 195 like that." T. at 747.

in any event, from the actual description of the Petitioner herein.[48/]

The homicide occurred on November 27, 1974. The Petitioner was arrested and charged with aggravated murder on March 21, 1975, T. 785-786. The identification procedure used by the Akron Police Department occurred on March 24, 1975, three days after the arrest. T. 430.

Some four months after the crime, Detectives Singleton and Oldacker went to the home of Mr. Alldredge at about 1:30 p.m., and at that time had him view six Akron "mug shot" photos (State's Exhibit Number 4), the Petitioner's photo being among them.[49/] Although Alldredge stated that he did not pay attention to the bottom portion of the photos, T. 440-441, the photos themselves at the bottom had an identifying number, date of arrest, height and weight of each individual, T. 434-435, 440-441. It should be noted that there were three (3) photos bearing arrest dates some several years prior to this crime (the other three being the alleged participants), T. 435-436. and that according to the descriptions thereon the defendant was the tallest and heaviest member of the array. Each photo showed two profile sides and one frontal shot of each individual. After viewing the photos for about five minutes, witness Alldredge picked out the defendant's photo, stating that he could only be "80 to 85% positive" that this was the individual, T. 738, 432, and that "all colored people looked alike" to him. T. 748-749. While then presented with the photographs, Alldredge was informed by the officers that the defendant was one of the individuals previously arrested for this crime. T. 749, 431, 441.

Whether the Stovall or Simmons reading is utilized, or this Court deems it necessary to fashion a new standard for use in capital cases, the relevant factors in the due process determination will continue to be: (1) the suggestiveness of the procedure used; (2) the existence of circumstances necessitating use of this procedure as opposed to other more reliable

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[48/] The actual description of the Petitioner is 6'0" in height, and 164 pounds in weight. State's Exhibit Number 4, photo number 63849.

[49/] Since the defendant was incarcerated in the Summit and Stark County jails since March 21, 1975, and lineup facilities were available at all times throughout this period, T. 430-431, no justification apparently existed for failing to present the Petitioner in a lineup. Although fine lineup facilities are consistently available for use, identification by photographic display appears to be the standard procedure of the Akron Police Department: "99.9% of all identifications are made through photo arrays." T. 437 and 874.

or less suggestive methods; (3) the opportunity of the witness to view the criminal at the time of the crime; (4) the witness' degree of attention; (5) the accuracy of the witness' prior description of the criminal; (6) the level of certainty demonstrated by the witness at the confrontation, and (7) the length of time between the crime and the confrontation.

A.

Suggestiveness

Upon analysis of these factors, it cannot be doubted that the identification procedure was clearly suggestive. The photos shown to Alldredge had clear markings relating to the height and weight of the individuals. Considering that Alldredge's primary recollection was that of "a very large individual," "a monster," T. at 859, and that Petitioner was the largest of all those pictured, this suggestiveness cannot be brusquely ignored. As the dates of arrest were also clearly marked, Alldredge could easily have unwittingly taken into account the fact that only three of the pictures were of persons arrested since the date of this crime.[50/] There was thus no need for the officers to verbally, "suggest which persons in the pictures were under suspicion," Simmons, at 385, and having been told by the officers that they had some photographs they wanted him to look at, T. 440, Alldredge was under some coercive pressure to make an identification arising from this statement and the officer's presence, Manson, at 3125.

B.

Necessity and Inherent Reliability

There were no circumstances necessitating the use of photographs with such information clearly printed thereon. The officers herein could easily have covered these portions of the photographs so as to cancel the inherent suggestiveness therein. They had plenty of time to make such a simple modification of the pictures. This was not a situation where the alleged "perpetrators were still at large" or where it was essential to "swiftly determine whether [the officers] were on the right track," Simmons,

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[50/] This is true even if Alldredge does not particularly recall looking at the bottom of the pictures, as witnesses are not "apt to be alert for conditions prejudicial to the suspect," nor are they "likely to be schooled in the detection of suggestive influences." Wade, at 230. Furthermore, it is clear he had more than adequate time to note the descriptions.

at 385. The Petitioner had been in custody for four days, and the police already had statements from alleged accomplices purportedly implicating him in the crime.

It should be noted also that there appear to be no exigent circumstances for holding a photographic identification rather than a lineup. Although this Court has refused to adopt a per se exclusionary rule requiring that the most reliable means of identification be utilized or the out-of-court identification will not be admitted, Manson, at 3123-3124, the inherent reliability of a given procedure should still be considered as one factor in the totality of the circumstances. It has been recognized by this Court that "corporeal identifications are normally more accurate" than photographic identifications, Simmons, at 386 n. 6, and awareness of this fact has led several courts to require that photographic identification procedure not be resorted to unless a proper corporeal identification is impossible or difficult.[51/]

In the instant case, no exigent circumstances whatever appear to justify the use of photos rather than a lineup. The lineup facilities were readily available, the Petitioner was in custody at the jail where numerous other persons were available for comparison,[52/] and there is no evidence whatever of any incapacity on the part of Alldredge to come down to the Akron Police headquarters.[53/] The fact that this was the Akron Police Department's "standard procedure"[54/] should not be allowed to permit diminished reliability in identification procedures in a capital case.

Having established that the procedure used was suggestive and unnecessarily so, there remains consideration of the Neil factors.

[51/] People v. Williams, 322 N.E. 2d 819 (Sup. Ct. Ill., 1975), People v. Anderson, 205 N.W. 2d 461 (Sup. Ct. Mich., 1973); People v. Jackson, 217 N.W. 2d 22 (Sup. Ct. Mich., 1974); State v. Nettles, 500 P. 2d 752 (Sup. Ct. Wash., 1972).

United States v. Gidley, 527 F. 2d 1345, 1352. (5th Cir., 1976) recommends this practice to federal authorities. "Generally, line-up identifications are preferable to photographic displays. The government should make every effort when defendants are in custody to hold line-up identifications with the presence of counsel . . . . In view of the serious consequences of misidentification, for the government not to make every reasonable effort to minimize gratuitously suggestive procedures is inexcusable." Accord, dissenting opinion of Mr. Justice Marshall in Manson, at 3129. See also Wall, supra at 70, 83.

[52/] Neil, at 199.

[53/] Stovall, at 302.

[54/] cf. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

C.

Opportunity to Observe

Alldredge's opportunity to view the criminal was of minimal duration and extensiveness. He only observed a side profile of the person during the short altercation in the parking lot before he turned away prior to the shots being fired, and could not see anyone in the car as it sped by him, T. at 734-738. The conditions, being 30 feet away as darkness was falling, were also not such as to provide a good view of the criminal. Alldredge clearly had "only a brief glimpse of a criminal . . . under poor conditions." Simmons, at 383.

D.

Degree of Attention

The degree of attention exhibited by Alldredge towards the man in the parking lot was quite weak. He did not pay "too much attention to facial features," or any attention to how he was dressed, nor could Alldredge say whether the person observed had any facial hair, T. 859, 860, 737, 747. Unlike the trained police officer in the Manson case, Alldredge was a "casual" and "passing observer," Manson, at 3124. He could not "be expected to pay scrupulous attention to detail" for he had no idea that "his claimed observations would be subject later to close scrutiny and examination at any trial." Manson, at 3124. His only view of Busch's assailant came before Busch was killed, while there was simply a fight in a local parking lot, T. 735. At the time of his observations, Alldredge had no means of knowing that a serious crime was being committed, in regard to which he might later be called upon to testify.

E.

Accuracy of Prior Description

The accuracy of Alldredge's prior description is similarly called into doubt, particularly as to the much greater height and weight of the individual seen, when compared to that of the Petitioner. A claim is certainly made here that the Petitioner did not possess the physical characteristics described, cf. Manson, at 3124.

F.

Certainty at Time of Identification

Alldredge was by no means confident of his identification of the Petitioner, either at the initial identification or at the trial. Since, "all colored people look alike," T. 748-749, to Alldredge, he could only be 80% to 85% positive that this was the man.[55/] This is not a situation where when asked whether this photograph was that of the criminal, the witness answered "no question whatever," Manson, at 3124, or where the witness had "no doubt," Neil at 200, as to the identity of the culprit. See also Simmons, at 385. Even at the trial, Alldredge was less than wholly certain as to whether the man whose picture he had chosen was in the courtroom, answering he was "pretty sure," T. 738. In a capital case, where the death penalty has been imposed, a more certain witness is absolutely essential to preserve the constitutional guarantee that one's life will not be taken without due process of the law.

G.

Lapse of Time

The significant time lapse between the crime and the confrontation is also a telling point. It was some four months after the crime that Alldredge chose the Petitioner's picture from the suggestive photo array. A lapse of several months is "a serious negative factor in most cases," Neil at 201. As Alldredge himself noted at the trial, "it's been so long," T. 739, since the incident (7 months) that he couldn't be positive of either his in-court identification or of whose picture he had chosen. As only a casual observer, Alldredge's memory could be expected to fade somewhat more than a victim of a crime. Neil, at 200.

Furthermore, in the instant case, a likelihood of irreparable misidentification was created by the officer's conduct. Having chosen a photograph, however uncertainly, Alldredge was told by the officers who had awaited his decision that in fact, the man pictured and chosen had been

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55/ As has recently been stated by the Sixth Circuit: "We have in the past noted that there is a great potential for misidentification when a witness identifies a stranger based solely upon a single, brief observation. This is especially true when the observations are made at a time of great stress and excitement . . . and when the stranger is of a different race." Webb v. Havener, 549 F. 2d 1081, 1086 (1977). See also Manson, at 3124, where this Court noted that a different race factor was not at issue therein.

arrested for this crime, T. 441. Under these circumstances, he was "not likely to go back on his word later on" at trial, Wade, at 229. Alldredge clearly would "retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness," Simmons, at 383-384, of his subsequent courtroom identification. This is even more assured when the identification in court was directly tied to the pre-trial procedure.[56/]

On consideration of the totality of the circumstances, it is thus abundantly evident that the Ohio Supreme Court overlooked a patent denial of due process rights in admission of testimony from an unnecessarily suggestive identification procedure clearly giving rise to irreparable misidentification. It is the fervent hope of this Petitioner that this Court will not allow the Ohio courts to so brush aside clear violations of constitutional rights, particularly in a capital case where the reliability of the guilt determining process must be maintained at the highest level attainable by our criminal justice system.

[56/] Q. And did you pick any of them as being the man?

A. Yes, I did.

Q. And is the man whose picture you picked out of those six pictures, is he in the Courtroom today?

A. I am pretty sure.

Q. Okay, would you please point him out?

(Indicating the defendant.)

T. 738.

CONCLUSION

For all the foregoing reasons Petitioner asks that the Writ of Certiorari be issued to the Supreme Court of the State of Ohio so that these issues may be heard by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Petition for a Writ of Certiori to counsel for the Respondent, Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 24th day of June, 1977.

Richard L. Turner
Counsel for Petitioner